IN THE

Supreme Court of the United States

October Term, 1966

No. 233

DAVID PAUL O'BRIEN,
Cross-Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above entitled case on April 10, 1967, after which petitioner filed a timely petition for rehearing, which was denied on April 28, 1967. The opinion of the Court of Appeals, and the opinion denying the petition for rehearing, are printed in the appendix hereto, and are not yet reported. The May 25, 1966 memorandum of the District Court denying petitioner's motion to dismiss, is also printed in the appendix hereto and is unreported.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

Questions Presented

Whether petitioner was denied due process of law under the Fifth Amendment to the United States Constitution when the Court of Appeals reversed his conviction of a violation of 50 U.S.C. App. §462(b)(3), on grounds of the statute's unconstitutionality, and held that he stood convicted of a violation of 50 U.S.C. App. §462(b)(6), an offense of which petitioner had not been charged and on which he was not tried.

Statute Involved

The statutory provision involved is Section 12(b) of the Universal Military Training and Service Act, 50 U. S. C. App., §462 (b) which reads as follows:

> "(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title (sections 451-454, 455-471 of this Appendix); or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges,

alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title (said sections), or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title (said sections) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury."

Statement

Petitioner was indicted on April 15, 1966 for willfully and knowingly mutilating, destroying and changing by burning his Selective Service Registration Certificate, in violation of 50 U. S. C. App., §462 (b). He pleaded not guilty and was released on bail. A motion to dismiss the indictment was timely filed and orally argued. It was de-

nied on May 25, 1966. The case was tried before a jury in the United States District Court for the District of Massachusetts on June 1, 1966. Petitioner was found guilty and the Court postponed for a month disposition of the case. On July 1, 1966, the District Court ordered petitioner committed to the custody of the Attorney General under the provisions of the Federal Youth Corrections Act, 18 U.S.C., §5010(b). In due course, petitioner's notice of appeal was timely filed and petitioner was later released on bail pending appeal. The Court of Appeals held unconstitutional that portion of 50 U.S.C. App., §462(b)(3) having to do with mutilation and destruction of Selective Service Certificate, of which petitioner had been charged, but held that he stood properly convicted of non-possession of a certificate, an offense under a regulation promulgated under the Act, a violation of which is a crime under 50 U.S.C. App., §462 (b)(6). The Court stated that this was an includable offense under the original charge, and that "the factual issue of non-possession" had been fully tried and found against petitioner.

Reasons for Granting the Writ

Certiorari should be granted in response to this cross-petition because the Court of Appeals has decided an important question of constitutional law which should be settled by this Court.

1. The issue of non-possession of a Selective Service certificate was not, contrary to the words of the Court of Appeals "fully presented and tried and been found against the defendant." Op., April 10, p. 5. Petitioner was not

charged with this offense; the prosecution never mentioned it; the jury was not instructed to consider it; and the petitioner had no reason to suppose that he was on trial for it. In these circumstances, due process of law was denied to defendant in convicting him of an offense on which he was not tried and on a charge that was never made. "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Cole* v. *Arkansas,* 333 U.S. 196, 201 (1948). See *Shuttlesworth* v. *City of Birmingham,* 382 U.S. 87, 91 (1965); *Ashton* v. *Kentucky,* 384 U.S. 195 (1966).

The denial of due process is aggravated by the fact that the petitioner was not represented by counsel in the trial court. It is true that he waived his right to counsel for the trial of the charge on which he was indicted. Had he had reason to suppose that other charges were lurking in the background, he might have realized his need for legal assistance. Consequently, petitioner contends that he never intentionally waived his right to counsel on the charge of which he is now held convicted.

2. The Court of Appeals, in its opinion of April 28 denying the petition for rehearing, points out that petitioner admitted that he burned his draft card. Op., p. 2. It is clear, however, that the symbolic burning, and the admission thereof, were acts of principle by petitioner. He admitted the facts and relied on his constitutional arguments. Op., April 10, pp. 2-4. But there is no indication that the same considerations would have motivated petitioner had he been charged with non-possession. His

grievance was with the anti-burning law, now declared unconstitutional and his admissions were limited to his defense of that charge. Perhaps if the government had proceeded against him for non-possession, he would not have felt impelled to raise the constitutional question, and would not have made any admissions. Perhaps the entire defense would have been otherwise, either by petitioner *pro se,* or by counsel whom he might have engaged had he known he stood in jeopardy of a conviction for non-possession under the existing law, as well as a conviction for burning under the new law.

3. Where a charge set forth in the indictment is held unconstitutional, a judgment of a conviction of that charge is void. *Shafer* v. *United States,* 179 F. 2d 929 (9th Cir. 1950). See also 21 Am. Jur. 2d, Section 533. If the conviction is void, it must follow that a holding that there can be an includable offense thereunder is erroneous.

Furthermore, the Court of Appeals relied on Federal Rule of Criminal Procedure 31 (c) in holding petitioner convicted of an includable offense. This rule applies only to lesser offenses and degrees of offense. *United States* v. *Martinez-Gonzales,* 89 F. Supp. 62, 65 (S.D. Cal. 1950); *United States* v. *Gerdel,* 103 F. Supp. 635, 639 (E.D. Mo. 1952). In the statute here involved, there are no degrees of offense, and the maximum punishment for non-possession is the same as that prescribed for the charge on which petitioner was indicted.

Conclusion

For the foregoing reasons, this cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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